

Murch (Migration) [2021] AATA 3260 (16 August 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Jason Hamilton Murch
CASE NUMBER:	2014028
DIBP REFERENCE(S):	BCC2017/2054362
MEMBER:	Hugh Sanderson
DATE:	16 August 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 16 August 2021 at 8:50am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – relationship ceased – attempts to reconcile the relationship – binding financial agreement finalised – no joint financial commitments – no evidence of social activities together – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 5, 65, 359
Migration Regulations 1994, Schedule 2, cl 801.221; r 1.15*

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 9 September 2020 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 9 June 2017 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied the applicant continued to be the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Background

4. The applicant is a citizen of the United Kingdom. He was sponsored in his application by Ms Lau who is an Australian citizen. They claim to have first met on 10 March 2015 and were married on 30 September 2016. The applicant was granted a Subclass 820 Partner (Temporary) visa on 21 March 2018.
5. The sponsor wrote to the Department on 30 December 2019 stating that she was withdrawing her sponsorship of the applicant. She stated that her relationship with the applicant had ended with the parties separating on 10 June 2019. She claimed the applicant had told her not to report the fact that their relationship had ended and she believed that he would have reported it himself.
6. On 6 January 2020 the Department wrote to the applicant with the information that they had been advised that his relationship with the sponsor had ended. The applicant was invited to comment on or respond to this information. He was advised of the alternative means by which the visa would be granted if he were not in a continuing relationship with the sponsor.
7. The applicant's agent responded on 22 January 2020 requesting further time to respond to the information. It was claimed that the parties were trying to reconcile their relationship and as the applicant was in Thailand at the time to attend his father's birthday celebrations, he was not able to respond in full. An email from the applicant to his agent was provided to the Department saying he was shocked that it was claimed his relationship with the sponsor had ended. He claimed that there had been problems in the relationship due to the fact that he was a remote worker but that he and the sponsor were working through these problems.
8. The Department wrote to the applicant on 23 January 2020 requesting further information to indicate that his relationship with the sponsor was continuing for the assessment of the grant of the Subclass 801 Partner visa.
9. The sponsor wrote to the Department on 14 February 2020 stating that there was no chance of any reconciliation between herself and the applicant. She said that she the only contact she had with the applicant since their separation was through lawyers to enter into a binding financial agreement which was finalised in December 2019. She stated that the relationship had broken down irretrievably.

10. The Department wrote to the applicant on 18 February 2020 advising him he had further time to respond to the information that his relationship with the sponsor had ended. He was required to respond to the information by 26 February 2020. No further information was received by the Department from the applicant.
11. The sponsor provided a statutory declaration dated 4 April 2020 where she stated that her relationship with the applicant had ended on 10 June 2019 and she had not seen the applicant since the end of that month. She said that she planned to apply for a divorce as soon as possible.
12. The delegate who considered the application noted that it had received information that the relationship between the applicant and the sponsor had ended. Despite requests by the Department for the applicant to provide information in response to this information no credible information had been provided which would indicate the parties were in a continuing relationship. No information was provided which would indicate the applicant would meet any of the alternative criteria for the grant of the visa if the applicant was not in a continuing relationship with the sponsor. Accordingly, the delegate found the applicant did not meet the criteria in cl.801.221 and refused the application.

Information to the Tribunal

13. When the applicant applied for a review of the Department's decision, he provided further documents in support of the application. This included the following:
 - Photo of the applicant and the sponsor together at a social event;
 - Photos of the parties together at their wedding and on other occasions; and
 - Photo of their marriage certificate.
14. The applicant provided a copy of the Department's decision to the Tribunal.
15. On 19 July 2021, the Tribunal wrote to the applicant pursuant to s.359A and s.359(2) of the Act. The Tribunal noted that information on the Department's file indicated that the applicant's relationship with the sponsor had ended. The applicant was invited to comment on respond to this information. The applicant was further invited to provide any further information to show he was in a continuing relationship with the applicant or he met any of the alternative criteria for the grant of the visa. The applicant was required to respond to this invitation by 2 August 2021. He was advised if he failed to respond to this invitation by 2 August 2021 he would lose his entitlement to a hearing.
16. At the time of this decision, no response has been received by the Tribunal from the applicant as to the information that his relationship with the sponsor had ended or any further material to indicate that the applicant meets the criteria for the grant of the visa. As the applicant has failed to respond to this invitation to comment on the information indicating he was no longer in a relationship with the sponsor or information that he met any alternative criteria, the Tribunal has proceeded to a decision based on the information currently before it.
17. The applicant was represented in relation to the review by his registered migration agent.
18. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

19. The issue in the present case is whether the applicant, at the time of this decision, continues to be the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

20. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claimed to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
21. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

22. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 30 September 2016. Although the sponsor had indicated that she intended to divorce the applicant, there is no information which would indicate that the parties do not continue to be married. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

23. There is no information that at the time of this decision that there are any financial aspects of the relationship indicating any continuing relationship between the applicant and the sponsor. No documentation or any other information has been provided which would indicate the parties have any joint assets or joint liabilities or that they are pooling their financial resources in any way. There is no information which would indicate the parties have any shared legal obligations to any other party or that they are sharing day to day household expenses. It was indicated by the sponsor that the parties had entered into a binding financial agreement which indicated the parties have agreed to terminate any shared financial arrangements.
24. The Tribunal finds the financial aspects of the relationship do not indicate the parties are living together in a genuine and continuing relationship or have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
25. No information has been provided which would indicate that at the time of this decision the parties are living together in a shared household. Information provided by the sponsor was that her relationship with the applicant ended in June 2019 and they have been living

separately and apart since then. The applicant claimed to the Department in January 2020 that he and the sponsor were attempting to reconcile their relationship. He claimed that there had been difficulties as he was employed as a fly in fly out worker and due to the time apart problems had arisen in their relationship. There is nothing to indicate that the parties at any time since June 2019 have resided in a household where the living arrangements would be indicative of their living in a genuine and continuing relationship. The applicant has not provided any information which would indicate the parties have been living in the same address at any time since June 2019. Although the applicant claimed in January 2020 that he and the sponsor were trying to reconcile their relationship, there is nothing to show that any reconciliation occurred or the parties ever recommenced living together.

26. The Tribunal finds that the parties are not living together in a household which would be indicative of their living together in a genuine and continuing relationship with a mutual commitment to a shared life as husband and wife to the exclusion of all others.
27. The applicant provided no credible information to the Department after being informed by the Department in January 2020 that they had received information that the relationship between the applicant and the sponsor had ended. When the applicant applied for the review of that decision, the applicant provided photos of the parties together, one of which was with a group of friends. There is no information to indicate when this photo was taken. As the sponsor has previously stated her relationship with the applicant has ended, it is not likely that this photo was taken at any time after June 2019. The other photos provided by the applicant appear to have been taken at the time the parties were married and give no indication that at the time of this decision the parties represent themselves to other people as being married to each other.
28. When the application was initially made, a number of statements were provided by friends attesting to the fact they believed the relationship was genuine. No further statement has been provided by any other friend or relative to indicate that the parties continue to be in a relationship or that they represent themselves as being married to each other. There is no information which would indicate that any friend or relative of the parties consider the relationship between the applicant and the sponsor is continuing. There is no information which would indicate the parties have at any time since June 2019 undertaken any social activities together or that they plan to undertake any social activities together in the future.
29. The Tribunal finds that the social aspects of the relationship does not support a finding that the parties are living together in a genuine and continuing relationship or that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
30. The parties were married on 30 September 2016. The sponsor contacted the Department in December 2019 to advise them that her relationship with the applicant had ended. Despite the applicant claiming that the parties were attempting to reconcile their relationship, the sponsor has repeated her claims that their relationship ended in June 2019 and that there was no chance of a reconciliation. There is no information which would indicate the parties were ever living together after June 2019 or that there was any reconciliation of their relationship.
31. There is no information before the Tribunal which would indicate that at the time of this decision the parties provide each other the degree of companionship and emotional support which would be expected in a genuine relationship. Indeed, the sponsor has claimed that she has had no contact with the applicant since June 2019 for any other reason apart from entering into a binding financial agreement. There is no information which would indicate that the parties at the time of this decision consider their relationship is long-term.

32. The Tribunal finds that the parties do not have any continuing commitment to any relationship with each other. The Tribunal finds that the lack of any commitment to the relationship indicates the parties do not live together in a genuine and continuing relationship or have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
33. As stated above, the sponsor has contacted the Department on a number of occasions to confirm that her relationship with the applicant ended in June 2019 and that there is no possibility of any reconciliation in the relationship. Despite the applicant being given opportunities to comment on this information by both the Department and the Tribunal, the applicant has provided no credible information which would indicate that there is any continuing spousal relationship between himself and the sponsor. The sponsor has stated that she had wishes to withdraw her sponsorship of the applicant.
34. The Tribunal finds that any spousal relationship between the applicant and the sponsor ended in 2019. The Tribunal finds that at the time of this decision the parties do not live together and that there is no intention for the parties to live together at any time in the future. The Tribunal finds that the parties are not in a genuine and continuing relationship and that they do not have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
35. Given these findings the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore, the applicant does not meet cl.801.221(2)(c).
36. Both the Department and the Tribunal invited the applicant to provide any information which would indicate that he would meet any of the alternative criteria for the grant of the visa. In his email dated 21 January 2020 sent to his agent, which the agent forwarded to the Department, the applicant claimed that the parties were "in the process of patching things up" and that the "verbal interactions between us are still borderline abusive". No claim has ever been made, however, that the applicant has suffered relevant family violence committed by the sponsoring partner. No evidence has been provided of any court proceedings between the applicant and the sponsor and no evidence has been provided of any nonjudicially determined claim of family violence.
37. There is no evidence that the parties had a child together or that the sponsor has died. Accordingly, the Tribunal finds the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221(2A), (3), (4), (5) or (6).
38. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

39. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).